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**BEFORE THE
DEPARTMENT OF TRANSPORTATION
WASHINGTON, D.C.**

DEPARTMENT OF TRANSPORTATION
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DOCKET SECTION

Application of)
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AirTran Airways, Inc.)
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Docket No. OST-97-2557-3

for an exemption from Subparts K and S)
of 14 C.F.R. Part 93 (High Density Rule) at)
New York LaGuardia Airport to)
Bloomington, IL/Moline-Quad Cities, IL,)
Toledo, OH/Akron-Canton, OH and)
Knoxville, TN)
)

**MOTION FOR LEAVE TO FILE AN ANSWER
AND ANSWER OF THE OFFICE OF THE QUEENS
BOROUGH PRESIDENT, CITY OF NEW YORK**

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**MOTION FOR LEAVE TO FILE AN ANSWER
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BOROUGH PRESIDENT, CITY OF NEW YORK**

I. Motion for Leave to File an Answer

The President of the Borough of Queens, City of New York ("Borough President"), hereby moves for leave to file an Answer to the Application by AirTran Airways, Inc. ("AirTran") for an exemption pursuant to 49 U.S.C. § 41714(c) from the limitation on operations at LaGuardia Airport in New York City (the "High Density Rule").

Queens County, which is the home of both LaGuardia Airport and John F. Kennedy International Airport, has a population of almost two million individuals. The thousands of jobs generated by these airports produce many benefits for Queens County, but the residents

of this borough also bear many burdens from the close proximity of the airports, including safety issues, increased vehicle traffic, air pollution and aircraft noise. If AirTran's application is granted, it could have significant adverse impacts upon the residents of Queens County, and there is no other party who can adequately represent their interests in this proceeding.

The Borough President is elected by and represents the entire county, and works closely with the aviation industry to balance the economic and transportation benefits of that industry with the negative impacts on residents. The unique perspective of this office makes the Borough President's views on this matter critical to the decision making process. Since one of the standards by which the application will be judged is whether granting the exemption is in the "public interest", it is essential that the Secretary be able to consider the views of the people of Queens County, where LaGuardia Airport is located.

Accordingly, it is respectfully requested that the Secretary accept this filing of this Answer to AirTran's application, and that the issues raised in this Answer be considered by the Secretary in deciding whether to grant that application.

II. AirTran's Application Should be Denied

AirTran is requesting an exemption so that it can initiate an additional 12 flights beyond the current limit imposed by the Federal Aviation Administration ("FAA") for LaGuardia Airport under the High Density Rule¹ without incurring the cost of purchasing available slots.

¹ 14 C.F.R. Part 93 Subparts K and S

In order for AirTran to meet the statutory test so that the Secretary may grant the exemption pursuant to 49 U.S.C. § 41714(c), AirTran must prove that an authorization for 12 additional flights at the already overcrowded LaGuardia Airport is in the public interest and it must demonstrate that there are exceptional circumstances warranting the granting of the application. AirTran has failed to satisfy either of these requirements, and accordingly the application should be denied.

**A. AirTran's Request for an Exemption
is Contrary to the Public Interest**

**1. AirTran has not demonstrated that an
exemption is consistent with public safety**

AirTran refers to three of the fifteen factors set forth in 49 U.S.C. § 40101 in support of its claim that the granting of an exemption is in the public interest. All of these factors relate purely to financial considerations, however, and AirTran wholly fails to address the first three factors set forth in that section, all of which relate to the safety of the traveling public, and which require the Secretary to consider:

- (1) assigning and maintaining safety as the highest priority in air commerce;
- (2) before authorizing new air transportation services, evaluating the safety implications of those services; and
- (3) preventing deterioration in established safety procedures, recognizing the clear intent, encouragement and dedication of Congress to further the highest degree of safety in air transportation and air commerce, and to maintain the safety vigilance that has evolved in air transportation and air commerce and has come to be expected by the traveling and shipping public.²

² 49 U.S.C. § 40101(a)(1)-(3).

AirTran makes absolutely no effort to address the safety issues that would be raised by its attempt to increase the number of flights to and from LaGuardia Airport. As the Department of Transportation is well aware, however, there have been a series of recent incidents at LaGuardia Airport and the other New York City airports during which aircraft separation requirements have been violated. Indeed, Newsday reported just last month that the number of “close call” incidents had increased 30% from the first half of fiscal year 1996 to the first half of fiscal year 1997, and that the increase is due, in part, to the large number of flights at the New York City airports. In response to this problem, the air traffic manager of the FAA’s New York Center in Ronkonkoma issued a memorandum on April 22, 1997, stating that the number of incidents had “reached levels of grave concern”, and requesting recommendations to bring about “an immediate and substantial reduction” in these incidents. Notably, one of the recommendations that was proposed was to reduce the number of flights that occur at these airports. See Newsday, May 1, 1997 at page A7.

Another aspect of this problem is the chronic shortage in the number of air traffic controllers in the New York City area. As the New York Times reported on May 2, 1997, the traffic control center is supposed to have a staff of 339 controllers, but only 308 controllers currently work at the center, and only 230 of those employees are fully trained. Senator Alfonse D’Amato recently stated that the shortage was “inviting disaster”, and Staten Island Borough President Molinari released the results of a survey showing that 97% of the controllers felt that the staffing shortages “strongly hindered” safety, and that “the amount of work they handled daily increased the risk of a mishap.”

The Borough President's Office recognizes that the safety of the traveling public is the highest priority of the FAA and the Department of Transportation. In addition, the Borough President's Office knows that the FAA is currently taking steps to reduce the number of "close call" incidents and to increase the number of air traffic controllers covering the New York airports, and we fully support those efforts. Nevertheless, until those improvements are fully implemented, it is incumbent upon AirTran to demonstrate that an addition of 12 flights per day at LaGuardia Airport is fully consistent with public safety, and they have wholly failed to meet this burden.

**2. Granting the requested exemption would place
undue burdens on the residents of Queens County**

AirTran's application also completely fails to address the adverse impact that its additional flights will have on the two million residents who live in Queens County. First, an increase in the number of flights will mean more noise over residential areas during the morning and evening hours when people are at home or in school.³ While an additional departure or arrival may have a minimal impact, the addition of twelve daily flights is significant, and the cumulative impact of all aircraft flights is highly disruptive and generates hundreds of complaints to this office.⁴

³ AirTran proposes departures at 0620, 0850, 0940, 1600, 1820 and 1930 hours and arrivals at 0820, 0910, 1245, 1750, 1900 and 2215 hours.

⁴ Queens County has the heaviest concentration of aircraft noise in residential areas in the country.

Second, the additional flights would be added to an already congested airport, leading to delays in flights during prime time hours, inconveniencing thousands of passengers each day. The congestion at LaGuardia Airport led to the imposition of the High Density Rule in the first place, and if any change has taken place since the rule was first imposed, it is that the airport has become more congested, not less.

In its last review of the continued applicability of the high density rule, the FAA concluded that it was in the best interest of national aviation policy to maintain the rule. In a decision announced on June 16, 1995, the Department concluded that the benefits of relaxing or eliminating the rule at LaGuardia Airport were greatly outweighed by the costs associated with additional delays and increased noise. The increase in the number of flights would exceed the airport's capacity, causing delays and flight cancellations whose cost would be greater than any economic benefit created by the increased flights. Further, the Department noted that there would be a significant impact to the large population which resides within the airport's DNL 65 contour. Although the report did not address the issue, there unquestionably also would be an increase in highway noise, traffic congestion and pollution from the increased vehicular traffic around the airport. The FAA's report did note that adding as few as 10 flights a day would result in increased delays and a significant net dollar loss to the economy.⁵ Since Congress authorizes the Secretary to grant exemptions to the High Density

⁵ AirTran proposes to add 12 flights each weekday. In denying the application of Spirit Airlines for an exemption to the high density rule at LaGuardia in 1995, the Department found that the increased congestion at the airport of 10 daily flights and the cumulative effects of such congestion on the surrounding community, outweighed any discernable benefit of granting the request. Spirit Airlines, Order 95-8-38 at p. 9.

Rule “*unless* such an exemption would significantly increase operational delays,”⁶ there is no congressional authorization for the Secretary to grant AirTran’s request.

AirTran’s arguments for an exemption are similar to arguments made by other airlines in previous applications for exemptions from the High Density Rule, one of which was made only weeks ago.⁷ If AirTran’s application is granted, then there will likely be a flood of new applications advancing similar arguments as to why the rule should be waived for them as well. Granting AirTran’s application could set a precedent in that any service between LaGuardia and an unserved or underserved location would meet several of the public interest criteria set forth in federal law. The effect of granting multiple exceptions would be inconsistent with the limits imposed by the rule in the first place.

The High Density Rule serves a critical function: to prevent demand for additional flights from overwhelming the ability of LaGuardia to effectively manage air traffic with minimal delays, and minimize the adverse effects of new traffic on the airport and local New York environment. Indeed, the cumulative effect of even the two pending applications would be 240% more flights than what the FAA report stated would create significant delays at LaGuardia.⁸

⁶ 49 U.S.C. §41714 (emphasis added).

⁷ Application of ValuJet Airlines, Inc., Docket No. OST-97-2442; See also, Application of Spirit Airlines, Inc., Docket No. 50366 (1995).

⁸ ValuJet also proposed adding 12 lights (6 departures and 6 arrivals) each day. The Office of the Borough President vigorously opposes both the ValuJet and the AirTran applications.

B. AirTran Has Not Demonstrated the Existence of Exceptional Circumstances Justifying an Exemption.

When Congress directed the Secretary to consider the effects of eliminating or modifying the High Density Rule, most of the criteria deal with the impact on the airport where the rule is imposed: “(i) congestion and delay in any part of the national aviation system; (ii) the impact of noise on persons living near the airport;...and (v) aviation safety.”⁹ The FAA has already determined that the High Density Rule continues to serve this purpose at LaGuardia and that increasing the number of slots would have a negative economic and environmental impact on New York, there is no reason to waive the rule except in the most extraordinary circumstances. Indeed, Congress understood that many new entrants could make a seemingly plausible argument that their new service would be in the public interest. Therefore, an additional requirement, that of “exceptional circumstances,” was imposed.

In its application, AirTran does not address the “exceptional circumstances” test at all. It has wholly failed to meet its burden of proof as set forth in 49 U.S.C. § 41714(c), and instead primarily discusses the benefits that its service would provide to the cities other than New York that would be served by its new service. Thus all of the purported economic benefits of the service would be outside of New York, while New York, and Queens in particular, would suffer the burdens.

Much of the benefit to these other airports could occur by adding service to airports that do not have slot restrictions. Thus, AirTran has failed to show why this particular service is unique or exceptional so as to justify an exemption from the High Density Rule. While

⁹ The remaining criteria dealt with economic issues. 49 U.S.C. §41714(e)(1)(B).

AirTran's primary thesis that an exemption would increase competition, an increase in competition is inherent in every additional flight at every airport, and that claim alone is insufficient to overcome either the "public interest" or the "exceptional circumstances" hurdles set forth in statute.

There is no question that the "public interest" and "exceptional circumstances" requirements are separate tests, each of which must be met before an exemption can be granted. As the Department stated in the Spirit Airlines case:

We have interpreted the intent of Congress narrowly because of the exceptional circumstances criterion. If Congress had intended that a less restrictive allocation process be established, it would have mandated that the grant of exemptions be based only on a public interest finding. In fact, 49 U.S.C. § 41714 states requirements that apply to slot exemptions for essential air service, for foreign air transportation, and for new entrant airlines. Congress mandated the exceptional circumstances criterion only in the provisions applicable to new entrant airlines. Clearly, Congress intended that a higher standard be met before granting exemption authority to new entrants.¹⁰

Although not mentioned as "exceptional circumstances" AirTran also claims that it is unable to purchase slots for its use from the current holders of slots at LaGuardia. The FAA rules¹¹ provide for the exchange, leasing and sale of slots at high density traffic airports, however, and if the demand for the service to be provided by AirTran is significant enough, then this market can and does provide a fair price for providing service. Moreover, AirTran appears to admit that it can purchase or lease existing slots, but asserts that it does not want the slots available on the market, because they do not meet its self-imposed schedule

¹⁰ Spirit Airlines, Order 95-8-38, page 5.

¹¹ 14 C.F.R. §93.221.

requirements. Obviously, the availability of slots changes as airlines adjust their schedules, and the sale and leasing of slots was intended by Congress to create a market where those issues can be addressed. AirTran should not be permitted to claim that the most profitable slots are not currently available, and then use that assertion to justify the granting of an exemption. In any case, it is clearly not an “exceptional circumstance” since other airlines seeking the most valuable slots could, and have, made the same argument.

CONCLUSION

The High Density Rule at LaGuardia Airport serves several essential purposes, including protecting the safety of the traveling public, reducing congestion and delays, and limiting noise pollution and traffic impacts on local residents. Congress clearly recognized the importance of these considerations, and explicitly stated that exemptions to the High Density Rule should be granted only to new entrants, only when the exemption in the “public interest”, and only when there are “exceptional circumstances” warranting the exemption.

For the reasons set forth above, AirTran has failed to meet the prerequisites to the granting of an exemption, and as a result its application should be denied.

Respectfully submitted,

CLAIRE SHULMAN,
President,
Borough of Queens

By:

A handwritten signature in black ink, appearing to read "Michael Rogovin", written over a horizontal line.

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June 4, 1997

CERTIFICATION OF SERVICE

I hereby certify that I served a copy of the foregoing Motion and Answer of the President of the Borough of Queens on June 4, 1997 by first class mail, postage prepaid, to each of the parties on the service list below:



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